

1 Christopher Sproul (State Bar No. 126398)
2 ENVIRONMENTAL ADVOCATES
3 5135 Anza Street
4 San Francisco, California 94121
5 Telephone: (415) 533-3376
6 Facsimile: (415) 358-5695
7 Email: csproul@enviroadvocates.com

8 Attorney for Plaintiff
9 ECOLOGICAL RIGHTS FOUNDATION

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 ECOLOGICAL RIGHTS FOUNDATION, a
13 non-profit corporation,

14 Plaintiff,

15 v.

16 UNITED STATES AIR FORCE

17 Defendant.

Civil Case No. 19-cv-6150

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

1 Plaintiff Ecological Rights Foundation (“EcoRights”) alleges as follows:

2 **INTRODUCTION**

3 1. EcoRights brings this action under the Freedom of Information Act (“FOIA”). FOIA,
4 amongst other things, allows an aggrieved party to seek relief when records are unlawfully withheld and
5 authorizes a reviewing court to enjoin the agency from withholding records and to order the production
6 of any agency records improperly withheld from the complainant. 5 U.S.C. § 552(a)(4)(B). EcoRights
7 seeks declaratory and injunctive relief for FOIA violations by the United States Air Force (“USAF”).
8 EcoRights submitted a FOIA request to USAF on February 15, 2019 (“FOIA Request”), and this lawsuit
9 addresses USAF’s failure to comply with the requirements of FOIA with regards to that FOIA Request.

10 2. FOIA “is plainly written so as to disfavor any effort by agency officials to shirk their
11 responsibilities to respond promptly and fully to requests for records.” *McGehee v. CIA*, 697 F.2d 1095,
12 1101 n.18 (D.C. Cir. 1983), *vacated in part on other grounds*, 711 F.2d 1076 (1983) (citation omitted).
13 Congress has shown “an increasing concern over the timeliness of disclosure, recognizing that delay in
14 complying with FOIA requests may be tantamount to denial.” *Am. Civil Liberties Union v. Dep’t of*
15 *Def.*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) (citations omitted).

16 3. Given the time-sensitive nature of FOIA requests, FOIA litigation is subject to expedited
17 judicial consideration. Unlike other civil litigation involving a federal agency, a responsive pleading is
18 required within thirty days of service. 5 U.S.C. § 552(a)(4)(C) (“Notwithstanding any other provision of
19 law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection
20 within thirty days after service upon the defendant of the pleading in which such complaint is made,
21 unless the court otherwise directs for good cause shown.”).

22 4. EcoRights’ FOIA Request seeks records related to former Environmental Protection
23 Agency (“EPA”) Administrator Scott Pruitt’s flights on USAF aircraft in June of 2017. FOIA Request
24 (attached as Exhibit 1). The records sought by EcoRights are crucial to inform the public about potential
25 misuse of military aircraft by USAF and unethical conduct by EPA and former Administrator Pruitt.

26 5. For EcoRights’ February 15, 2019 FOIA Request, USAF has failed to issue a final
27 determination on the FOIA Request in compliance with FOIA’s mandatory timelines, improperly
28 withheld agency records that are responsive to the FOIA Request, failed to conduct an adequate search

1 for records that are responsive to EcoRights' FOIA Request, and failed to provide EcoRights with a
2 current estimated completion date for the entire FOIA Request. USAF's violations of FOIA at issue in
3 this case have thwarted EcoRights' efforts to timely receive current information in USAF's possession
4 and have hampered EcoRights' efforts to serve as an effective public interest watchdog over
5 governmental activities.

6 JURISDICTION

7 6. This Court has jurisdiction pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), which allows an
8 aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing
9 court to enjoin the agency from withholding records and to order the production of any agency records
10 improperly withheld from the complainant. This Court also has jurisdiction over this action pursuant to
11 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel an officer of the United
12 States to perform his duty).

13 7. This Court has authority to grant declaratory relief pursuant to the Declaratory Judgment
14 Act, 28 U.S.C. § 2201. This Court has authority to grant injunctive relief pursuant to 28 U.S.C. § 2202
15 and 5 U.S.C. § 552(a)(4)(B).

16 8. This Court has authority to award costs and attorney fees pursuant to 5 U.S.C. §
17 552(a)(4)(E).

18 9. "In the event of noncompliance with the order of the court, the district court may punish
19 for contempt the responsible employee, and in the case of a uniformed service, the responsible member."
20 5 U.S.C. § 552(a)(4)(G).

21 10. The FOIA claims made in this Complaint are ripe for judicial review and the harm USAF
22 has caused to EcoRights can be remedied by an order of this Court.

23 11. This Court has personal jurisdiction over USAF and its officials because USAF is an
24 agency of the federal government operating within the United States.

25 VENUE

26 12. Venue in the United States District Court for the Northern District of California is proper
27 under 5 U.S.C. § 552(a)(4)(B) because EcoRights' principal place of business is located within the
28 Northern District of California, specifically in Garberville, California in Humboldt County.

THE PARTIES

13. Plaintiff EcoRights is a non-profit, public benefit corporation, organized under the laws of the State of California, with its principal place of business located in Garberville California. EcoRights is devoted to furthering the rights of all people to a clean, healthful, and biologically diverse environment. To further its environmental advocacy goals, EcoRights often requests information through FOIA that allows it to serve as a public interest watchdog and to ensure that the Federal government is behaving ethically, that it is carrying out its duties responsibly, and that it is complying with the principles of good governance. EcoRights brings this action on its own behalf and on behalf of its adversely affected staff and members.

14. Any person who files a FOIA request is deemed to have standing to invoke the jurisdiction of the Federal Courts to carry out the judicial review provisions of FOIA. EcoRights filed the FOIA Request at issue and has standing to bring this FOIA suit.

15. EcoRights works in furtherance of its goals in part by acquiring information regarding federal programs and activities through FOIA. EcoRights then compiles and analyzes that information and, subsequently, disseminates that information to its membership, the general public, and public officials through various sources, including reports posted on its website and other websites and through television and radio interviews. EcoRights' successful efforts at educating the public on issues concerning federal government programs and activities contribute significantly to the public's understanding of governmental operations and activities. EcoRights also uses the information that it acquires through FOIA to participate in federal decision-making processes, to file administrative appeals and civil actions, and generally to ensure that federal agencies comply with federal laws.

16. EcoRights regularly uses FOIA as an important avenue for gaining information about agency activities. EcoRights is harmed when it is denied timely access to documents to which it is entitled, as it has been here. This harm is ongoing as EcoRights is still unable to use this information to educate the public.

17. EcoRights intends to continue its use of FOIA to access agency records in the possession of USAF. Specifically, EcoRights has concrete plans to submit additional FOIA requests to USAF as

1 EcoRights' advocacy efforts continue, and to follow up on the information learned while reviewing
2 agency records responsive to the present FOIA Request.

3 18. One of the purposes of FOIA is to promote the active oversight role of public advocacy
4 groups incorporated in many federal laws applicable to federal agencies, including the Administrative
5 Procedure Act. *See, e.g.*, 5 U.S.C. §§ 551, *et seq.* EcoRights uses FOIA to publicize activities of federal
6 agencies and to mobilize the public to participate in advocacy to elected and other government officials.
7 EcoRights intends to continue using FOIA requests to fulfill its oversight and advocacy role through
8 scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. The
9 FOIA Request seeks to understand USAF and EPA's actions and policies that appear to have violated
10 the law and principles of good governance. This harm can be remedied in part by ensuring EcoRights
11 has prompt access to public records going forward.

12 19. EcoRights, its staff, or one or more of its members have and will suffer direct injury by
13 the USAF's failure to comply with the statutory requirements of FOIA, and a favorable outcome of this
14 litigation will redress that injury. USAF's refusals to provide timely FOIA access to agency records
15 interferes with EcoRights' ability to participate as an informed watchdog, looking over USAF's actions
16 to ensure that it adequately follow the law. EcoRights is also harmed by USAF's failure to provide
17 EcoRights with a current estimated completion date for the FOIA Request. This failure prevents
18 EcoRights from planning for review of the records and deprives EcoRights of information necessary to
19 determine whether it must litigate the FOIA Request at issue in order to timely secure the records that it
20 has requested.

21 20. Defendant USAF is a federal agency of the United States, and sub-component of the
22 United States Department of Defense, and as such, is an agency subject to the FOIA, pursuant to 5
23 U.S.C. § 552(f). FOIA charges USAF with the duty to provide public access to agency records in its
24 possession or control. USAF possesses records responsive to EcoRights' FOIA Request. USAF is
25 denying EcoRights access to its records in contravention of federal law.

26 21. USAF failed to lawfully make a determination on EcoRights' FOIA Request within the
27 statutory twenty-working-day limit. As of the date of this filing, USAF possesses, controls, and
28 unlawfully withholds agency records responsive to EcoRights' FOIA Request that are not subject to a

FOIA exemption. As of the date of this filing, USAF has not completed a FOIA-compliant search for records responsive to EcoRights' FOIA Request. As of the date of this filing, USAF has not used its tracking system to provide EcoRights with information on the FOIA Request, including a current estimated completion date for the FOIA Request, or otherwise provided EcoRights with a current estimated completion date for the FOIA Request.

STATUTORY AND REGULATORY BACKGROUND

22. FOIA was amended in 2007 to reaffirm that Congress, through FOIA, continues to seek to "ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the fundamental 'right to know.'" Pub. L. No. 110-175, 121 Stat. 2524, Section 2 ¶ 6 2007).

23. Administrative remedies are deemed exhausted whenever an agency fails to comply with the applicable time limits of FOIA, and this puts all questions of FOIA compliance, including but not limited to failure to comply with the twenty-business-day determination deadline, within the jurisdiction of the federal courts. 5 U.S.C. § 552(a)(6)(C)(i).

24. FOIA requires that an agency disclose documents to any person except where the document falls under a specifically enumerated exemption. 5 U.S.C. § 552. The courts have emphasized the narrow scope of these exemptions and "the strong policy of the FOIA that the public is entitled to know what its government is doing and why." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

25. When an agency decides to withhold records under a claim of exemption, it must notify the person making the request of that determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i). Government agencies bear the burden of proof to show that any withheld documents are exempt from the otherwise complete duty to disclose. 5 U.S.C. § 522(a)(4)(B).

26. On June 30, 2016, former President Obama signed into law the FOIA Improvement Act of 2016. The Act made significant amendments to FOIA, effective as of enactment on June 30, 2016. 5 U.S.C. § 522, § 6; Department of Justice Office of Information Policy Summary of the FOIA Improvement Act of 2016, available at <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> ("OIP FOIA 2016 Summary"). The amendments include changes to the standard by which USAF

1 must evaluate potential withholdings. The FOIA Improvement Act of 2016 dictates that agencies shall
2 withhold information only if disclosure would harm an interest protected by an exemption – what is
3 referred to as the “foreseeable harm standard” – even if that information is arguably subject to an
4 exemption claim by the agency. 5 U.S.C. § 552(a)(8)(A)(i); OIP FOIA 2016 Summary.

5 27. 5 U.S.C. § 552(a)(6)(A)(i) requires that the agency provide enough information,
6 presented with sufficient detail, clarity, and verification, so that the requester can fairly determine what
7 has not been produced and “the reasons therefore.”

8 28. FOIA also requires an agency to consider partial disclosure whenever the agency
9 determines that full disclosure of a requested record is not possible and to take reasonable steps
10 necessary to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(A).

11 29. An agency’s process for dealing with FOIA requests constitutes “withholding” if its net
12 effect is to significantly impair the requester’s ability to obtain the records or significantly increase the
13 amount of time he or she must wait to obtain them. *McGehee*, 697 F.2d at 1110.

14 30. FOIA requires that an agency, upon any request for records, shall promptly make the
15 records available. 5 U.S.C. § 552(a)(3)(A). An agency shall make a determination whether to comply
16 with a request within twenty business days after the receipt of the request and shall immediately notify
17 the party making the request of such determination, the reasons for the determination, and the party’s
18 right to appeal. 5 U.S.C. § 552(a)(6)(A)(i).

19 31. Federal agencies are under a duty to conduct a reasonable search for records responsive
20 to a party’s request using methods that can be reasonably expected to produce the records requested to
21 the extent those records exist. 5 U.S.C. § 522(a)(3)(C).

22 32. FOIA also mandates that each agency shall maintain an online or telephone system that
23 provides information about the status of a FOIA request to the person making the request that uses the
24 assigned tracking number and includes the date on which the agency originally received the request and
25 an estimated date on which the agency will complete action on the request. 5 U.S.C. § 552(a)(7). The
26 tracking system and requirement to provide an estimated completion date were amended into FOIA in
27 2007 to help remedy widespread and casual agency violation of FOIA deadlines.
28

33. FOIA disputes are normally resolved on summary judgment, with the burden of proving FOIA compliance falling on the agency. The agency must carry its burden of demonstrating all elements of FOIA compliance. The agency may meet its litigation burdens by providing declarations, and disclosing contravening evidence in its possession, that address, among other things: a broad interpretation of the FOIA Request, lawful search, lawful cut-off date for each search for documents responsive to the request, and the justification for withholding any agency record or part thereof in a “Vaughn Index.”

34. FOIA provides additional statutory relief where the Court has granted the plaintiff statutory attorney fees and entered orders compelling disclosure of withheld records. In those cases, the Court may enter judicial findings that the agency’s conduct in addressing a FOIA request involves circumstances that raise questions as to whether the agency acted arbitrarily or capriciously while violating the plaintiff’s rights involving timely FOIA access to agency records. 5 U.S.C. § 552(a)(4)(F).

FACTUAL BACKGROUND

35. On February 15, 2019, EcoRights submitted the FOIA Request to USAF. This FOIA Request, and USAF’s violations of FOIA related to it, is the basis for this lawsuit.

36. EcoRights’ FOIA Request seeks several specific categories of documents relating to former Administrator Pruitt’s potentially unethical and illegal use of USAF aircraft for international travel. The documents EcoRights requests constitute the best available evidence of this potentially unethical and illegal activity.

37. On information and belief, USAF has never attempted to or made contact with EcoRights related to the FOIA Request, including acknowledging that the Request has been received.

38. EcoRights contacted USAF on September 20, 2019 to inquire into the status of the FOIA Request. EcoRights made it clear that USAF’s determination was now over six months overdue and that EcoRights would bring a lawsuit to remedy this violation of FOIA if USAF did not produce all records within one week. USAF has failed to respond to this email, necessitating this lawsuit.

39. As of the filing date of this Complaint, EcoRights has not received USAF’s final determination on the FOIA Request. As of the filing date of this Complaint, USAF has not

1 communicated a completion date by which EcoRights can expect a final determination on the FOIA
2 Request.

3 40. As of the filing date of this Complaint, USAF currently possesses or controls, and is
4 withholding, agency records responsive to EcoRights' FOIA Request that are not subject to a FOIA
5 exemption. USAF's withholding of agency records is unlawful.

6 41. As of the filing date of this Complaint, USAF continues to withhold agency records
7 responsive to the FOIA Request. USAF has not made and communicated a final determination on the
8 FOIA Request. USAF has not completed a FOIA-compliant search. USAF has not provided the "cut-off
9 date" used for any search, thereby frustrating EcoRights' intent to file a follow-up FOIA request. USAF
10 has provided no sufficient basis for withholding any of the specific agency records being withheld in full
11 or in part.

12 42. EcoRights now turns to this Court to provide relief that ensures EcoRights, its
13 membership, and the public have the prompt public access to agency records guaranteed by FOIA. 5
14 U.S.C. § 552(a)(6).

15 **FIRST CLAIM FOR RELIEF**

16 **Violation of FOIA: Constructive Denial and Unlawfully Withholding**

17 **Agency Records Responsive to the FOIA Request**

18 43. EcoRights repeats and incorporates by reference the allegations in the above paragraphs
19 and all paragraphs of this Complaint.

20 44. USAF has not communicated to EcoRights the scope of the documents it intends to
21 produce and withhold in response to the FOIA Request or its reasons for withholding any documents,
22 and has not disclosed to EcoRights records responsive to the FOIA Request.

23 45. USAF violated FOIA (5 U.S.C. § 552(a)) by failing to provide a lawful determination
24 and response to EcoRights' February 15, 2019, FOIA Request within the statutory twenty-day period. 5
25 U.S.C. § 552(a)(6)(A)(i).

26 46. This failure to make a lawful determination on EcoRights' FOIA Request within the time
27 frame required by FOIA is a constructive denial and wrongful withholding of the records EcoRights
28 requested in violation of FOIA. 5 U.S.C. § 552(a)(6)(A)(i); 5 U.S.C. § 552(a)(6)(C)(i).

47. USAF continues to violate FOIA by not making responsive records promptly available to EcoRights. 5 U.S.C. § 552(a).

SECOND CLAIM FOR RELIEF

Violation of FOIA: Unlawfully Withholding Agency Records

Responsive to the FOIA Request that are Not Subject to a FOIA Exemption

48. EcoRights repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

49. EcoRights has a statutory right to the records it seeks, and there is no legal basis for USAF to assert that any of FOIA's nine disclosure exemptions apply. *See* 5 U.S.C. § 552(b)(1)-(9).

50. USAF continues to violate FOIA by illegally withholding agency records that are responsive to the FOIA Request, but which USAF has not demonstrated are subject to any FOIA withholding provision and which, on information and belief, are not subject to any such provision. 5 U.S.C. § 552(b).

THIRD CLAIM FOR RELIEF

Violation of FOIA – Failure to Conduct an Adequate Search

51. EcoRights repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

52. EcoRights has a statutory right to have USAF process its FOIA Request in a manner that complies with FOIA. EcoRights' statutory rights in this regard were violated when USAF unlawfully failed to undertake a search reasonably calculated to locate records responsive to EcoRights' FOIA Request.

53. USAF continues to violate FOIA by failing to conduct and document a lawful search for responsive records, which is a condition precedent to a lawful determination. On information and belief, USAF has withheld responsive agency records due to an unlawfully narrow search. 5 U.S.C. § 552(a)(3)(B)-(C).

FOURTH CLAIM FOR RELIEF

Violation of FOIA – Failure to Provide an Estimated Completion Date

54. EcoRights repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

55. Pursuant to 5 U.S.C. § 552(a)(7)(B)(ii), USAF must provide EcoRights with “an estimated date on which the agency will complete action on the request.”

56. USAF has failed to provide an estimated date of completion for EcoRights’ FOIA Request.

REQUEST FOR RELIEF

WHEREFORE, EcoRights respectfully requests that this Court enter judgment providing the following relief:

A. Enter findings and declare that USAF violated its duty to comply with FOIA’s statutory deadlines;

B. Enter findings and declare that USAF violated FOIA by unlawfully withholding agency records responsive to EcoRights’ FOIA Request;

C. Enter findings and declare that USAF violated FOIA by failing to conduct a search reasonably calculated to locate the records responsive to EcoRights’ FOIA Request;

D. Enter findings and declare that USAF has violated its duty to provide EcoRights with the estimated completion date for EcoRights’ FOIA Request;

E. Direct by injunction that USAF provide EcoRights a lawful determination on EcoRights’ FOIA Request by a date certain;

F. Direct by order that USAF conducts a lawful search for responsive records.

G. Direct by order that USAF provides proof that it conducted a lawful search with a cutoff date set as the date of such order;

H. Direct by injunction that USAF promptly provide all agency records responsive to EcoRights’ FOIA Request that are not subject to withholding pursuant to one of the nine recognized FOIA exemptions.

1 I. Direct by order that USAF provide EcoRights with a detailed statement justifying each
2 withholding of an agency record, or portions thereof, in accordance with the indexing requirements of
3 *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

4 J. Direct by order that USAF provide EcoRights with all responsive agency records by a
5 date certain, within twenty working days of any such order;

6 K. Grant EcoRights' costs of litigation, including reasonable attorney fees as provided by
7 FOIA, 5 U.S.C. § 552(a)(4)(E); and,

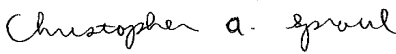
8 L. Provide such other relief as the Court deems just and proper.
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10 **DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

11 Based on Plaintiff's knowledge to date, pursuant to Civil Local Rule 3-15, the undersigned
12 certifies that, as of this date, other than the named parties, there is no such interest to report.

13 Dated: September 27, 2019

Respectfully submitted,

14 By: 
15 Christopher Sproul
16 Counsel for Ecological Rights Foundation
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